United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7348

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To be argued by
Saul Z. Cohen

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

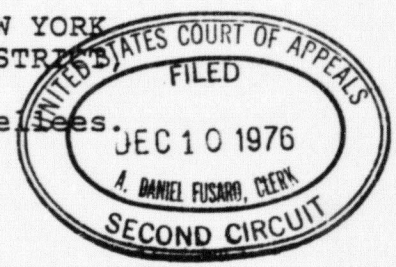
THE BOARD OF EXAMINERS,

Defendant-Appellant,

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK AND THE CHANCELLOR OF THE CITY SCHOOL DISTRICT,

Defendants-Appellees.



On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases: Page

Cases: Page

Cases: Page

Statutes

Rules and Regulations:

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REPLY BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

Our main brief demonstrates that the Judgment below is unsupportable and that, in light of Washington v. Davis, 426 U.S. ___, 96 S. Ct. 2040 (1976), this case should be dismissed in its entirety. This conclusion is confirmed by appellees' briefs,* both directly and also from their failure to respond to numerous dispositive issues.

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* Throughout this Reply Brief, the Board of Examiners' main brief is often referred to as "Bd. Ex. Br."; the Board of Education's brief as "Ed. Br."; and plaintiffs' brief as "P. Br."

Judge Pollack's decision, if left standing, sounds the death knell for the Examiners. That statutory body will have lost the power to select and utilize the supervisory examination procedures it deems appropriate.* But more important, the decision below means the end of the merit system as prescribed by New York law.

The Judgment below is the culmination of a long effort by plaintiffs and the Board of Education to eliminate the Board of Examiners. This statement is not the paranoid delusion of hungry officeholders seeking to retain their jobs but, rather, a statement of fact based upon a record going back over many years.**

In 1969 the New York State Legislature passed the "School Decentralization Law". That legislation radically changed the Education Law by removing substantial powers from the central Board of Education and devolving them on Community School Boards. The Legal Defense Fund ("LDF") and the Public Education Association ("PEA") -- which have provided counsel to the plaintiffs in this action -- were among the principal proponents of the Decentralization Law and sought at that time to eliminate the Board of

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* It would then follow that plaintiffs will propose that the legislature formally abolish the Examiners because they have so little to do.

**The Board of Education's motion to "modify" was but a renewal of its sporadic but long-standing attempt to deprive the Board of Examiners of its exclusive powers over pedagogical and supervisory examinations. Thus, over fifty years ago, the New York State Education Commissioner twice rejected attempts by the Board of Education to seize the Examiners' powers. See the Jurisdiction and Investigation Cases cited in the Examiners' main brief at pp. 61-64 and Addendum B. Moreover, even now the Board of Education is attempting to use other means to weaken the Examiners. Thus, it has only recently slashed the Examiners' budget and cut its personnel while at the same time retaining the Board of Education's own department of personnel almost unscathed.

Examiners. However, the legislature did not agree and when the Decentralization Law was enacted (N.Y. Educ. L. § 2590), it not only retained the Board of Examiners, but required that future supervisory examinations be "objective".

Not reconciled to the decision of the legislature, plaintiffs commenced this action in 1970. The preliminary injunction of Judge Mansfield did what the legislature refused to do, but on a temporary basis.

Thereafter, at the suggestion and urging of both this Court and Judge Mansfield, the Examiners sought to negotiate a new examination system with the LDF and the PEA. The initial course of those negotiations made clear that the objective of the LDF and PEA was to reduce the Examiners' role to one of insignificance. Nevertheless, after years of arduous negotiation, a plan for a comprehensive new examination system -- the Permanent Plan -- was jointly developed and all agreed it was acceptable and constitutional.

The Permanent Plan embodied significant compromises made by the Board of Examiners in an effort to settle this case by agreement. For example, the Examiners' original settlement proposal did not call for on-the-job evaluations (I-45-63a). That element was included as a compromise with plaintiffs who originally sought to eliminate all tests and then to use only on-the-job evaluations (I-708-709a). It is indeed ironic that Judge Pollack's Judgment discards all testing features deemed important by the Examiners and leaves only the on-the-job evaluations considered critical only by plaintiffs' counsel.

Significantly, even while the Board of Examiners was

negotiating a settlement of this case, efforts to abolish it in the legislature continued, but all such efforts have been unsuccessful.* Thus, only in the court below have efforts to destroy the Board of Examiners found any success.

Before dealing with these and other issues more thoroughly, we turn first to the impact of Washington v. Davis upon this case.

I

WASHINGTON v. DAVIS

In our main brief (Bd. Ex. Br., pp. 16-32) it is shown that the 1973 Consent Judgment herein should be vacated and this case dismissed in its entirety because of the Supreme Court's recent decision in Washington v. Davis, 426 U.S. ___, 96 S. Ct. 2040 (1976). The Supreme Court in Washington specifically noted its disagreement with this Court's affirmance of the issuance of a preliminary injunction herein and held that, absent intentional discrimination, a test which has a racially disproportionate impact is not unconstitutional.

Plaintiffs and defendant Board of Education contend (1) that Washington is not directly contrary to the decisions on the preliminary injunction motion herein; (2) that Washington is irrelevant because plaintiffs could have, in any event, amended

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* See e.g. S. 2410, 196th & 197th Reg. Sess. (1973-1974); S. 383, 196th & 197th Reg. Sess. (1973-1974); S. 381, 196th & 197th Reg. Sess. (1973-1974); A. 2997, 196th & 197th Reg. Sess. (1973-1974); S. 3401, 194th & 195th Reg. Sess. (1971-1972); A. 11013, 195th Reg. Sess. (1972); S. 1406, 194th & 195th Reg. Sess. (1971-1972); S. 1306, 194th & 195th Reg. Sess. (1971-1972).

their complaint to add a Title VII claim; and (3) that, for a number of reasons (including the doctrine of res judicata), even if they are wrong as to (1) and (2) above, the Examiners should be precluded from raising the impact of Washington on this case. Each of the appellees' contentions is without merit.

Washington Overrules Prior Decisions In This Case.

Plaintiffs and the Board of Education have misconstrued what the Supreme Court held in Washington. They erroneously seek to read Washington as holding that intent to discriminate must be proven only in some, rather than all, cases brought under the Constitution. Moreover, their emphasis on the job relatedness vel non of the Examiners' prior examinations turns the traditional two part test applied in equal protection cases on its head.*

The courts have traditionally applied a two part test in cases challenging examinations as being violative of the Equal Protection Clause of the Constitution. First, the plaintiffs in such a case are required to prove a prima facie case of

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* Appellees really contend that even after Washington v. Davis the standards to be applied are the same whether a case is brought under Title VII or under the Constitution. But, the Supreme Court in Washington expressly held that it was reversing the judgment below

> "[b]ecause the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it. . . ." 96 S. Ct. at 2046.

Moreover, the Court repeatedly stressed the difference between the standards applicable under Title VII and under the Constitution (96 S. Ct. at 2047, 2051) and expressly rejected application of Title VII's "more rigorous standard" in cases brought under the Fifth and Fourteenth Amendments to the Constitution (at 2051).

discrimination and second, if that is established, the burden is shifted to the defendant government agency to attempt to justify that discrimination. Prior to Washington, the courts had repeatedly held that, as in Title VII cases, the first part of the test could be satisfied by a showing that there was a statistical disparity in results among racial or other groups. See e.g. Chicano Police Officer's Assoc. v. Stover, 526 F.2d 431, 438 (10th Cir. 1975), judgment vacated, 96 S. Ct. 3161 (1976);* and this Court's decision affirming the issuance of a preliminary injunction herein, 458 F.2d 1167, 1176 (1972). Such a discriminatory effect was deemed sufficient to satisfy the first part of the equal protection test and thus to establish a violation of the Equal Protection Clause unless the defendant could justify the discriminatory effect.

Washington worked a fundamental change in the first part of this constitutional equation by holding that a plaintiff cannot satisfy the first part of the test unless he proves that the defendant had "a racially discriminatory purpose" and that proof of a statistical disparity in results standing alone is not sufficient for that purpose. 96 S. Ct. at 2047.** Under

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* In Stover, the Tenth Circuit -- expressly relying upon this Court's decision affirming the issuance of a preliminary injunction in Chance, 458 F.2d 1167 -- held that the same standard applies in a case brought under the Constitution as in a Title VII case. 526 F.2d at 438. On a petition for a writ of certiorari, the Supreme Court summarily granted the writ, vacated the Tenth Circuit's judgment and remanded ". . . to the Court of Appeals for further consideration in light of Washington v. Davis. . . ." 96 S. Ct. at 3162.

**Cases decided subsequent to Washington have consistently held that a showing of intentional discrimination is required in order to establish any violation of the Equal Protection Clause

Washington, unless the plaintiff proves the existence of "a racially discriminatory purpose" the burden never shifts to the defendant. Washington did not deal with the second part of the equal protection test, i.e. the nature of the burden which the government agency must overcome -- whether compelling state interest or rational relationship -- in order to justify the discriminatory treatment.

Thus, in Washington, once the Supreme Court enunciated the rule requiring proof of intentional discrimination and found none present in that case, it concluded Part II of its decision by holding that it was error to grant plaintiffs' motion for summary judgment ". . . which rested on purely constitutional grounds. . . ." 96 S. Ct. at 2046. Since it was unnecessary to do so, the Court never reached the second part of the equal protection test.

The Supreme Court's decision in Washington is obviously directly contrary to this Court's prior decision on plaintiffs' preliminary injunction motion. There, this Court recognized that intentional discrimination had not been established but held, nevertheless, that ". . . the protection afforded racial minorities by the fourteenth amendment" still extended to this case. 458 F.2d at 1175.

In an attempt to evade the clear holding in Washington,

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of the Constitution. See e.g. Gibson v. Local 40, 12 EPD ¶ 11,215 at p. 5608 n.9 (9th Cir., September 29, 1976); Paige v. Gray, 538 F.2d 1108, 1110 (5th Cir. 1976); Armstrong v. Brennan, 539 F.2d 625, 633-637 (7th Cir. 1976); Mieth v. Dothard, 418 F. Supp. 1169, 1179-1182 (three judge court M.D. Ala. 1976), prob. juris. noted, 45 U.S.L.W. 3393 (U.S. November 29, 1976); Chambliss v. Foote, 12 EPD ¶ 11,072 at p. 4999 n.6 (E.D. La. 1976).

both plaintiffs and the Board of Education rely almost exclusively on the language of Part III of the Court's opinion. That part of Washington solely relates to the question whether the test there in issue violated applicable federal statutes and regulations.* Thus, the discussion in Part III of the Court's opinion about the job relatedness of the test is wholly irrelevant to the constitutional standard enunciated in Part II of the Opinion of the Court.

Chance Is Not And Cannot Be A Title VII Case.

This case was brought in 1970 under the Fourteenth Amendment at a time when Title VII of the Civil Rights Act of 1964 did not apply to state and local governmental employees. (Bd. Ex. Br., pp. 6, 23n.) Yet, plaintiffs and the Board of Education seek to treat this case as if it were a Title VII case and thereby avoid the holding in Washington v. Davis. Thus, they

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* Washington involved a test for police officers in the District of Columbia. Plaintiffs claimed that the test violated the Constitution, as well as various sections of the District of Columbia Code and the United States Code. After resolving the constitutional issues in Part II of its opinion, the Supreme Court then addressed itself to the statutory issues in Part III. Because it concluded that the test ". . . complied with all applicable statutory as well as constitutional requirements" the Court held that the defendants' motion for summary judgment should have been granted below. Justice Stevens' concurring opinion confirms this dichotomy between what was held in Parts II and III of the Opinion of the Court:

> "While I agree with the Court's disposition of this case, I add these comments on the constitutional issue discussed in Part II and the statutory issue discussed in Part III of the Court's opinion." 96 S. Ct. at 2054.

See also the dissent of Justice Brennan which repeatedly makes reference to this same dichotomy in the Court's opinion. 96 S. Ct. at 2055-2062.

contend that Washington is irrelevant because Title VII was amended in 1972 to include such governmental employees and that "[p]laintiffs would clearly have the right to amend their complaint to make this a Title VII case. . . ." P. Br., p. 32n. See also Ed. Br., p. 14. Their argument must fail for at least two reasons.

First, it has been uniformly held that Title VII does not apply retroactively to allegations by state or local governmental employees of discrimination occurring prior to March 24, 1972 -- the effective date of the Title VII amendment. See e.g. Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Cohen v. Ill. Institute of Technology, 524 F.2d 818, 822 n.4 (7th Cir. 1975), cert. denied, 96 S. Ct. 774 (1976); Kramer v. Bd. of Educ., 419 F. Supp. 958 (S.D.N.Y. 1976); Popkin v. N.Y.S. Health and Mental Hygiene Facilities Improvement Corp., 409 F. Supp. 430 (S.D.N.Y. 1976). See also Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 n.8 (1974).

Second, the district court in this case previously held that plaintiffs could not amend their complaint to add Title VII claims because, inter alia, plaintiffs had not complied with Title VII's procedural and administrative prerequisites to a judicial action (I-560-562a).*

Washington v. Davis May Properly Be Raised Here And Now.

Both plaintiffs and the Board of Education also contend that, for a number of reasons, the Examiners should be precluded

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* Additional reasons why this case cannot be a Title VII case are listed in Bd. Ex. Br., p. 29.

from raising the impact of Washington on this case. These contentions are equally without basis.

First, plaintiffs' contention that the doctrine of res judicata precludes this Court from considering Washington's impact on this case (P. Br., pp. 24-27) is wrong since:

> ". . . res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." State Farm Mutual v. Duel, 324 U.S. 154, 162 (1945).

See Whitcomb v. Chavis, 403 U.S. 124, 161-163 (1971); System Federation v. Wright, 364 U.S. 642 (1961); Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975); Jones v. Schellenberger, 225 F.2d 784, 790-791 (7th Cir. 1955), cert. denied, 350 U.S. 989 (1956).*

Second, plaintiffs' bald contention that the decision in Washington is not the kind of change in law that should lead a court to modify or vacate a prior decree (P. Br., pp. 37-39) is directly contrary to a long line of authority. See e.g. Vandenbark v. Owens-Illinois Glass, 311 U.S. 538 (1941); Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975); Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974); Paige v. St. Louis Southwestern Ry., 349 F.2d 820 (5th Cir. 1965); McComb v. Crane, 174 F.2d 646 (5th Cir. 1949); Bowles v. Good Luck Glove, 150 F.2d 853 (7th Cir. 1945), cert. denied, 326 U.S. 794 (1946).**

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* Plaintiffs contend that res judicata does not bar reconsideration of issues previously decided by this Court on a prior appeal so long as ". . . there ha[s] never been a final judgment on the relief to be awarded" (P. Br., p. 25n.) and inconsistently contend that "[t]his appeal involves simply the details of the relief to be accorded plaintiffs. . . ." (P. Br., p. 26.)

**Both plaintiffs and the Board of Education also argue that this Court should not consider Washington's impact because that

Third, the Board of Education argues (Ed. Br., p. 15) that ". . . this Court should not disturb the underlying findings of liability herein or the 1973 Final Consent judgment" because relief has been rendered thereunder. Both the premise for this argument and its conclusion are erroneous. The premise is erroneous because there was no conclusive adjudication of liability here.* The conclusion is also erroneous because the Examiners have expressly stated that, while they wish to dissolve the

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question should first be addressed to the district court. (P. Br., p. 34; Ed. Br., p. 16.) But, even plaintiffs concede ". . . the obvious proposition that new decisional law that comes down while an appeal is pending is relevant to the appeal of the decision below" (P. Br., p. 24). When Washington was decided, Judge Pollack had already rendered his decision granting the Board of Education's motion to "modify", and denying the Board of Examiners' motion to implement, the Consent Judgment. Certainly, the interests of judicial economy would be served by having this Court consider Washington on the appeal from that determination. It is ridiculous for the appellees to suggest that this Court should now close its eyes to the Supreme Court's intervening decision in Washington only to have to face the impact of that decision on a subsequent appeal. Moreover, would not this Court feel imposed upon if the Board of Examiners had failed to disclose this important intervening change in law, thereby possibly leading this Court to render a meaningless decision?

* While the district court made certain findings for the purpose of granting preliminary injunctive relief, Washington teaches that those very findings are incorrect. Moreover, it has been consistently recognized that findings on a preliminary injunction motion are not binding on the parties in subsequent proceedings because they are, by their ". . . very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive . . .," Hamilton Watch v. Benrus Watch, 206 F.2d 738, 742 (2d Cir. 1953). Accord: Berrigan v. Sigler, 499 F.2d 514, 518-519 (D.C. Cir. 1974); Imperial Chemical Industries v. National Distillers & Chemical Corp., 354 F.2d 459, 463 (2d Cir. 1965); Meyers v. Jay Street Connecting R.R., 288 F.2d 356, 360 & n.10 (2d Cir.), cert. denied, 368 U.S. 828 (1961); Male v. Crossroads Associates, 337 F. Supp. 1190, 1194 (S.D.N.Y. 1971), aff'd, 469 F.2d 616 (2d Cir. 1972). Finally, the Consent Judgment superseded the determination made on plaintiffs' motion for a preliminary injunction and it expressly provides that it

prospective application of the Consent Judgment, "[t]hey do not wish to disturb licenses issued, or other rights, privileges or perquisites obtained, under that Judgment." (Bd. Ex. Br., p. 27n.2.)

This Case Should Be Dismissed.

We cannot conclude this discussion of Washington without once again calling attention to certain fundamental facts. First, this case exclusively involves examinations conducted during the years 1962 to 1969, those examinations have been discontinued and there is no threat that they will be reinstituted. The Examiners have publicly committed themselves to maintaining and administering non-discriminatory, job-related examinations. (Bd. Ex. Br., pp. 28-30.) Second, under no circumstances can Title VII apply to the matters at issue herein. And, third, plaintiffs have already obtained substantial relief for any supposed discrimination involved in those old examinations.

Thus, one must ask what this case is presently all about. It seems clear to the Board of Examiners that the pendency of this case is being used by plaintiffs and the Board of Education -- whose interests at this moment in time coalesce -- in their joint effort to prevent the Board of Examiners from carrying out its statutory duty and mandate. This Court should put an end to this ancient case.

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is not an adjudication on the merits, that it is based upon a Stipulation of Settlement and that the defendants disclaim all liability (I-139a, 259a).

II

STATE LAW ISSUES

The Judgment below violates New York State law both by interfering with the Examiners' exclusive control over determinations of fitness and the selection of the means used by the Examiners to aid them in making such determinations and because the Revised Plan itself violates New York law. (See Bd. Ex. Br., pp. 58-68; and Point II of the CSA's Amicus Brief.) Plaintiffs advance a series of erroneous contentions in an effort to justify the district court's rewriting of New York's Education Law. Each of those contentions is without basis.

First, plaintiffs argue that the Board of Education is in charge of the New York City School System and that, not only did it have the power to propose the Revised Plan, but the district court had ". . . virtually no choice but to approve it". (P. Br., p. 49.) This contention is not only unsupported, but unsupportable.* Furthermore, it is wholly inconsistent with both the Education Law and plaintiffs' prior position throughout this case.

The Board of Examiners was created by the New York Education Law for the very purpose of having an autonomous agency

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* The only case cited by plaintiffs in this regard, C.S.A. v. Bd. of Educ. (P. Br., pp. 49-51), is totally inapposite. It has nothing whatever to do with the power of the Board of Education vis-a-vis the Board of Examiners. Rather, it relates solely to the Board of Education's power to create a new position and thereafter to require that applicants take a new examination for it to be developed and administered by the Examiners. (23 N.Y.2d at 468-469, 297 N.Y.S.2d at 555-556.)

develop examinations and assess the merit and fitness of candidates for positions within the Board of Education. Thus, as the Chancellor of the City School District recently declared:

> ". . . State law . . . mandates a competitive examination system for teachers by an autonomous Board of Examiners, independent of the supervision of the Board of Education and the Chancellor." (Board of Education Release N-34 Nov. 10, 1976.)

In the past, even plaintiffs recognized the Board of Examiners' autonomous power and control over the selection of examination procedures and rejected the notion that the Board of Education could intrude upon it.* Thus, in 1974, when the Board of Education sought to overturn the "interim" selection system adopted as part of the Consent Judgment, plaintiffs argued to this Court that:

> ". . . if there were doubt as to the propriety under New York law of the proposed examination procedures it is clear under New York law that the doubt must be restored in favor of the Board of Examiners. It is the Examiners that are charged with enforcing civil service merit and fitness standards as to New York City school supervisors. They, not the Board of Education, make the final decision as to what procedure does and does not meet these standards. The Board of Education recognized this allocation of responsibility at the outset of this action when it agreed to defer to the Examiners and not actively defend the action itself. . . . This same issue of a dispute between examiners

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* Moreover, in his decision accompanying the March 1975 Order, Judge Tyler recognized ". . . the Board of Examiners' need to be allowed to fashion a new selection system, in accordance with its statutory duties" and the Permanent Plan, and that, although defendants must report, ". . . plaintiffs are not given any formal power to affect the manner in which the tests are developed and administered, as long as the March 25th order and the [Permanent] Plan annexed thereto are followed." (I-540-541a, 542a.)

and a Board of Education arose in Craig v. Board of Education, 173 Misc. 969, 19 N.Y.S. 2d 293 (Sup. Ct. N.Y. County 1940), aff'd mem. 262 App. Div. 706, 27 N.Y.S. 2d 993 (1st Dept.). The examiners there had determined that it was not 'practicable' to conduct a competitive examination for a certain position and the Board of Education disagreed. The decision of the examiners prevailed:

> 'If . . . the Civil Service Commission, or other authority charged with the administration of Civil Service Law, makes a determination that is in conflict with the views of the executive or appointing authority, the decision of the Civil Service Commission will prevail, and the court will not review its exercise of discretion.' 173 Misc. at 982. [Citation omitted.]

In the case at bar the Board of Examiners has entered voluntarily into a Stipulation of Settlement setting out certain interim examination procedures for licensing supervisors. Since there can be no doubt but that these procedures are a reasonable exercise of the Examiners' discretion, the disagreement of the Board of Education is beside the point. The New York State courts would refuse to adopt the views of the Board of Education if raised in the context of a challenge brought by that Board to the Examiners' decision. The Board of Education's challenge in this federal forum to the voluntary settlement entered into by the Examiners would be rejected under the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), even if there were no overriding federal law basis for the issuance of the district court's order." (Brief of Plaintiffs-Appellees dated January 2, 1974, Appeal No. 73-2320, pp. 29-30) (Emphasis added).*

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* In addition, contrary to plaintiffs' ludicrous argument (P. Br., pp. 5, 46-47), the Judgment below does not merely "permit" the Examiners to carry out the Revised Plan. It enjoins any other selection or licensing system thereby requiring that the Examiners abide by that Plan. This result follows because the 1973 Consent Judgment enjoined defendants from "conducting further examinations" and "administering examinations" except to the extent authorized therein. (I-252-253a.) The Consent Judgment permitted selection and licensing pursuant to the "interim" system (I-253-255a) and thereafter, as the result of the March 1975 Order (I-506-538a), authorized defendants to administer the Permanent Plan. Thus, prior to the entry of the Judgment

Second, plaintiffs contend that, under the Education Law, the Board of Education sets the qualifications for supervisory positions and that it can, therefore, require the Examiners to employ the procedures set forth in the Revised Plan. (P. Br., pp. 47-48, 54-55.) This fatuous effort to justify alteration of New York law must be rejected. Under the Education Law, the Board of Education may designate new positions; and the Chancellor and Board of Education may "promulgate minimum education and experience requirements" (§ 2590-j(2)) or, put another way, the "academic and professional qualifications required for each kind or grade of license" (§ 2573(10)). But these "requirements" or "qualifications" are merely the college courses and teaching-supervisory experience which a candidate must satisfy or possess before he is even eligible to take one of the Board of Examiners' tests. (See Bd. Ex. Br., pp. 66-67.) Once a new supervisory position is created, it is the Board of Examiners which not only determines whether the eligibility requirements have been satisfied, but also creates and administers the tests to determine the "merit and fitness" of eligible candidates. Thus, it is absurd for plaintiffs to assert that the Board of Education's control over eligibility requirements and the designation of new

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appealed from, the Examiners were enjoined from conducting examinations or licensing supervisors except pursuant to the "interim" system or the Permanent Plan, both of which the Examiners agreed to. As a result of the Judgment appealed from, the Examiners can now only license pursuant to the more restrictive Revised Plan, to which they did not agree, and are enjoined from any other means or method of selection and licensing. (See Bd. Ex. Br., pp. 33-35.)

positions permits it to interfere with the Examiners' exclusive control over methods of testing for such positions.*

Third, plaintiffs argue that the Revised Plan mandated below is "identical in all relevant respects" to the "interim" selection and licensing system adopted under the Consent Judgment; and that this Court's affirmance in 1974 of the modified preliminary injunction against the Board of Education constitutes the law of this case that the Revised Plan is consonant with New York law. (P. Br., pp. 46, 51-52.) But, unlike the Revised Plan, the Board of Examiners agreed to the "interim" system because it was part of a larger settlement of this case and was to last for only a short period -- no more than six months -- during which time the parties were to continue their efforts to agree upon a permanent system of plenary examinations. And, more importantly, as plaintiffs recognized above, the Examiners, as the agency with exclusive power in this area, had agreed to the "interim" system.

Moreover, not only did this Court express doubt as to the legality of the "interim" system,** but it clearly indicated that if such a system were made permanent, it might not be lawful:

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* Moreover, since under the Revised Plan "the job itself is the test" (P. Br., p. 61), that Plan is contrary to the requirement that the Examiners "prepare and administer objective examinations" (N.Y. Educ. L. § 2590-j(3)(a)(1)).

**Thus, this Court stated that the "interim" system "appears to comply" with New York law (496 F.2d at 824); and expressly noted that if the order appealed from, as on the present appeal, had ". . . authorize[d] the permanent licensing of school supervisors without any examination . . . it would probably run afoul" of New York law (496 F.2d at 823).

> "Finally, we must note that were the litigation to remain indefinitely in its unfinished state, the propriety of continuing to allow permanent appointments would be another matter. The interim tail would then be wagging the dog and the incentive for plaintiffs' class to obtain a permanent non-discriminatory testing system would diminish considerably and perhaps disappear. . . . Allowing another lengthy period of time to go by, thus creating further eligibles for permanent appointment as an 'interim' measure, would approach an abuse of discretion." 496 F.2d at 825.*

Fourth, plaintiffs erroneously contend that the Revised Plan is consonant with New York law because it provides for an "unassembled examination" (P. Br., pp. 56-57).** The cases cited by plaintiffs (P. Br., p. 56) were not decided under the Education Law which requires "objective examinations" but rather in both cases it was the State's civil service department which chose to utilize the "unassembled" procedure under specific circumstances for a single position on a single occasion. Here, the Board of Examiners, the comparable testing agency, vigorously

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* The "interim" procedures were agreed to by the Board of Examiners and approved by this Court in a factual context far different from that here. At the time of the 1973 Consent Judgment there were hundreds of supervisors who had been appointed on an "acting" basis so that the schools could be properly staffed while the preliminary injunction was in effect. This "interim" system was meant to stabilize the City's School System by permitting these "actings" to be licensed without giving up their positions while the parties negotiated the permanent plan for plenary examinations (I-204a, 248a, 618a; 496 F.2d at 825).

**It is not significant to say that an examination is "unassembled", for that method of testing only ". . . obviates the necessity of applicants to assemble at a particular test site, on a day certain for written or oral examinations." Young v. Trussel, 42 Misc.2d at 109, 247 N.Y.S.2d at 605.

opposes requiring it to implement the procedures set forth in the Revised Plan for all supervisory positions at all times.*

III

"MODIFICATION" ISSUES

Our main brief makes clear that the court below erred in "modifying" the prior decrees to delete the Permanent Plan and to substitute the Revised Plan over the opposition of the Board of Examiners. (Bd. Ex. Br., pp. 36-57.) The response of the plaintiffs and Board of Education is limited essentially to two arguments, neither of which has merit. First, that the March 1975 Order approving the Permanent Plan was not entered on consent (P. Br., pp. 17-19, 65); and second, that the Judgment below can be justified either because it allegedly was designed to better achieve the purposes of the prior decrees in this case (P. Br., pp. 61-68) or because of alleged changed circumstances (Ed. Br., pp. 4-9).

The March 1975 Order.

For all relevant purposes, the March 1975 Order (I-506-538a) was entered upon the consent of all the parties herein (see Bd. Ex. Br., pp. 10-12):

1. That Order was entered pursuant to the terms of the 1973 Consent Judgment which expressly contemplated the

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* Plaintiffs' argument at pp. 56-57 that the Revised Plan meets the less demanding standards governing "qualifying" examinations ignores Education Law § 2590-j(3)(a)(1) passed in 1969 which requires supervisory examinations to be "objective". At present, the only difference between a "qualifying" examination and a "competitive" examination is that candidates who pass "qualifying" tests do not have their names listed in rank order on eligible lists.

substitution of a permanent plan for plenary examinations for the "interim" selection system (I-254a, 256-259a). Thus, this case is unlike one in which liability is determined after trial and the court then fashions appropriate relief.*

2. As Judge Tyler recognized (I-541a), virtually the entire Permanent Plan was fashioned not by him, but by the parties after hundreds of hours of negotiations and public and private meetings (I-202a, 314a, 459a-5, 622a, 704-705a).** As to this vast portion of the Permanent Plan, the court's only function was to approve it as being "a new, constitutional licensing system" (I-541-542a).

3. The only issues which the parties were unable to agree upon were reporting requirements and the choice of consultants to be used in developing prototypes under the Permanent Plan. But Judge Tyler resolved the disagreement over reporting requirements entirely in plaintiffs' favor*** and plaintiffs' counsel admitted that they only objected to the consultant selected by the Board of Education to develop prototype job

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* There was no conclusive determination of liability here. See Point I, supra, at p. 11n.

** The Permanent Plan submitted as part of plaintiffs' motion in January 1975 (I-354-382a) was identical to the plan submitted as part of defendants' motion in December 1974 (I-316-340a) except with regard to the two unresolved issues. Thus, the motion to "modify" below sought to discard a plan which both the Board of Education and plaintiffs not only agreed to but urged Judge Tyler to approve and incorporate as part of the Consent Judgment.

***Cf. defendants' proposed reporting requirements (I-338-340a) and plaintiffs' proposal (I-376-382a) with the reporting provisions adopted by the court (I-509-511a, 535-538a).

analyses and had no quarrel with the consultant selected by the Examiners to develop prototype examinations (I-462-464a). Moreover, the Board of Education and the Board of Examiners jointly moved to resolve the two disputed issues and thus they did not have a quarrel with each other (I-307-309a). In short, to the extent that there was disagreement among the parties with regard to the March 1975 Order, and that disagreement was not resolved in plaintiffs' favor, it was between plaintiffs and the Board of Education. In addition, the motion to "modify" below was not addressed to either of the disputed questions since it did not seek to change the reporting requirements or the selection of consultants or even to change the method of preparing job analyses. Rather, that motion sought to discard the entire Permanent Plan as well as almost the entire March 1975 Order. (I-581-590a; see Bd. Ex. Br., pp. 15, 33-35.)

Since the March 1975 Order and the Permanent Plan were in all relevant respects consensual, the court below erred in failing to apply the appropriate stringent legal standards described in our main brief at pp. 36-57.*

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* Even assuming arguendo that the March 1975 Order was not a consent decree, the Judgment below is nevertheless erroneous because the motion to "modify" should have been governed by the principles enunciated by the Supreme Court in United States v. Swift & Co., 286 U.S. 106 (1932), and its progeny. (Bd. Ex. Br., pp. 40-42, 51-57.) See Humble Oil & Ref. v. American Oil, 405 F.2d 803 (8th Cir.), cert. denied, 395 U.S. 905 (1969); United States v. Int'l Boxing Club, 220 F. Supp. 425 (S.D.N.Y. 1963) and 178 F. Supp. 469 (S.D.N.Y. 1959), all of which applied the principles enunciated by Justice Cardozo in Swift to deny motions to modify non-consent judgments.

Plaintiffs' "Modification" Argument.

Plaintiffs contend that the Judgment below may be justified as an effort to "modify" the decree below to further its purposes (P. Br., pp. 63-67). An analysis of the principal case relied upon by plaintiffs in this regard, United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), demonstrates that this doctrine is totally inapposite here.

First, United Shoe stressed that a different standard governs modification of a decree at the request of a plaintiff, as in United Shoe, than modification at the request of a defendant, as in Swift and the instant case. Under United Shoe's interpretation of Swift, a defendant seeking to modify a decree must show that the decree's purposes have been achieved as well as that the decree's continued existence is causing oppressive hardship and grievous wrong through unforeseen changed circumstances (391 U.S. at 248-249). Since the motion to "modify" below was made by defendants Board of Education and Chancellor (and not plaintiffs) and no claim has ever been made, nor could it, that the purposes of the decrees in this case have been achieved (I-127-128a, 257-258a, 513-514a), United Shoe alone demonstrates that the Judgment below must be reversed.

Second, United Shoe offers no support for a motion by a defendant to modify a decree to better achieve a decree's purposes.*

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* Nevertheless, plaintiffs argue (P. Br., pp. 2, 12, 45-49, 61) that since they originally commenced this lawsuit and supported the defendant Board of Education's motion below, that motion is entitled to deferential treatment. This contention completely overlooks the fact that the 1973 Consent Judgment (I-251-259a,

Third, in contrast to the instant case, United Shoe involved a motion to modify a decree rendered after the plaintiff won the case following a trial on the merits. 391 U.S. at 245-246. In light of the holding in United States v. Armour & Co., 402 U.S. 673, 681 (1971), that consent decrees "cannot be said to have a purpose . . .", United Shoe is not authority to modify a consent decree.*

Fourth, in United Shoe, the Supreme Court stressed that a "decade is enough" time (391 U.S. at 252) to allow a decree to

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504a) and the Permanent Plan embodied in the 1975 Order (I-272-280a, 307-309a, 507-509a, 541a) were based upon the Board of Examiners' consent. Thus, the fact that other parties favored "modification" is irrelevant, for all the parties must consent (see Bd. Ex. Br., pp. 38-39). Moreover, the courts have applied Swift's standards and denied modification motions without regard to how many parties support or do not oppose the motion. See e.g. United States v. Swift & Co., 286 U.S. 106 (1932); United States v. Shubert, 163 F. Supp. 123 (S.D.N.Y. 1958). Thus, in Swift, the two non-movant defendants conditionally consented to the modification motion (286 U.S. at 113). Plaintiffs took a comparable position below with respect to the Board of Education's "modification" motion. (See Plaintiffs' Brief dated April 26, 1976, pp. 10-11.)

* To permit such a modification would be directly contrary to the cases cited in our main brief at pp. 37-40. Moreover, assuming arguendo that United Shoe could apply to a consent judgment (and it cannot), Armour holds that the purposes of the parties to such a decree are embodied and ". . . must be discerned within its four corners . . ." (402 U.S. at 682) rather than in satisfying what might have been the aim of one of the parties thereto. The purposes of the March 1975 Order, expressly set forth in the Permanent Plan, was ". . . the development of examinations by the Board of Examiners to fulfill its statutory responsibility to provide examinations for the licensing of supervisors on the basis of 'merit and fitness'" and ". . . non-discriminatory personnel selection policies. . . ." (I-513a.) The Judgment entered below would not better achieve either of these purposes.

achieve its purpose and that "[n]o claim is made that the Government has petitioned for modification before the running of a reasonable period during which the effects of the original decree have become clear." Id. at 252 n.5. In contrast, the Permanent Plan for plenary examinations in this case had only been part of the Consent Judgment since March 1975 -- hardly enough time to judge its effects, especially since the Board of Education had not even taken the first step necessary to implement that Plan.*

In short, plaintiffs' contentions with regard to the proper standards for modification of a decree are without merit.**

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* Plaintiffs also rely upon King-Seeley Thermos and United Assoc. of Journeymen (P. Br., pp. 66-67), but both are equally inapposite. In King-Seeley, this Court noted that the defendant which was petitioning to modify the judgment had "obtained equitable relief in the decree of injunction quite as much as" the plaintiff (418 F.2d at 35) because both parties had rights in the name "thermos" and, in fashioning a decree, the court had to strike a balance between "two kinds of right-doing." (Id.) For this reason, King-Seeley is unlike modification motions in the more usual cases where either a plaintiff seeks to achieve the decree's purposes or a defendant seeks to escape its strictures. Moreover, King-Seeley involved a litigated judgment and, unlike in the instant case, the district court had the benefit of approximately 4-1/2 years to determine if the decree was achieving its purpose.

Journeymen did not even involve modification of a decree. It only concerned an effort "'to compel compliance' with the [previous] District Court order . . ." (438 F.2d at 414) which the court there held to be "appropriate".

**Plaintiffs also argue that the district court was not required to hold an evidentiary hearing prior to granting the motion to "modify" below (P. Br., p. 68 n.68). This contention completely overlooks the governing authority. (See Bd. Ex. Br., pp. 53-56.) Moreover, plaintiffs are also wrong in claiming that the Examiners are precluded from seeking such a hearing. (P. Br., p. 68 n.68.) See Home Ins. v. Aetna Cas. & Sur., 528 F.2d 1388 (2d Cir. 1976)(per curiam); Heyman v. Commerce & Indus. Ins., 524 F.2d 1317 (2d Cir. 1975); Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 879 (2d Cir. 1972).

Board Of Education's "Modification" Argument.

As in the court below (I-581-582a, 591-601a), the Board of Education seeks to justify "modification" under Swift by claiming "changed circumstances and new facts since the entry of the March 1975 Plan". (Ed. Br., p. 4.) We demonstrated in our main brief at pp. 43-48 that the Board of Education had utterly failed to make the requisite showing of changed circumstances. We need make only two further points here.

First, the Board of Education places principal reliance on alleged defects in the prototype job analyses prepared by its consultant (AIR).* But in early 1975 the Board of Education insisted on its right to select AIR to prepare these prototypes even if plaintiffs objected (I-388-389a, 408-410a). Then, after prototypes were prepared by AIR, the Board of Education refused to either approve them or to revise or redo them to remedy objections. Since the Permanent Plan sets forth in great detail the procedure to be followed in creating the prototype analyses, supposed defects in those prototypes cannot be a justification for any change in the Permanent Plan, no less the Board of Education's thus far successful effort to discard the entire Permanent Plan.** Certainly, if the prototypes are defective, the defects

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* Two of the allegedly new facts referred to in their brief deal with those prototype job analyses. (See Ed. Br., pp. 5, 8.)

**Even assuming arguendo that as a matter of policy there is an arguable basis to change the Permanent Plan's methodology for the creation of job analyses, that certainly does not provide a basis for discarding the entire Permanent Plan.

should be remedied. It would be absurd for anyone to claim that it is not possible to prepare proper job analyses.

Second, the parties themselves developed the procedures set forth in the Permanent Plan for the development of prototype job analyses and they all agreed that those procedures ". . . afford[ed] a sound basis for developing a constitutional new licensing system".* (I-349a; see also I-307-309a, 459a-10-460a.) Based upon these facts, Judge Tyler approved the Permanent Plan and incorporated it as part of the Consent Judgment in 1975 (I-540-543a). In doing so, Judge Tyler recognized the limitations on the scope of the federal judicial function by holding that following entry of that Order

> "[t]he only court review will be of the new system itself (rather than of its development), as each new test is implemented, to determine whether it is constitutional, not to determine whether it is the best test or the fairest test which could conceivably be created." (I-543a.)

Thus, while Judge Tyler enunciated the proper standard, see Wheeler v. Berrera, 417 U.S. 402 (1974),** Judge Pollack failed to follow it.

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* Moreover, even during the oral argument of the motions below, plaintiffs' counsel adhered to their position that the Permanent Plan was constitutional. (I-907-908a.)

**In Wheeler, the Supreme Court held that a federal court may not require a state or local government agency to adopt a particular procedure, but may only determine whether the adopted procedure complies with federal law:

> "It is unthinkable, . . . in terms of . . . the basic structure of the federal judiciary, that the courts be given the function of measuring the comparative desirability of various pedagogical methods. . . .
>
> * * *
>
> [Quotation continued.]

IV

THE SCOPE OF REVIEW

Appellees argue that any error below did not amount to an abuse of discretion, which they claim is the standard of review on this appeal (P. Br., pp. 12, 44, 61; Ed. Br., p. 4).* This argument is without basis:

1. The courts have felt free to reverse modifications based on alleged changed circumstances merely upon a finding of error below. See United States v. Swift & Co., 286 U.S. 106 (1932); SEC v. Jan-Dal Oil & Gas, Inc., 433 F.2d 304 (10th Cir. 1970).

2. Even assuming arguendo that an abuse of discretion standard applies on this appeal,** this Court may freely reverse

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> It is . . . to be understood that the District Court's function is not to decide which method is best, or to order that a specific form of service be provided. Rather, the District Court is simply to assure that the state and local agencies fulfill their part of the Title I contract if they choose to accept Title I funds." 417 U.S. at 423, 427.

* The authority relied upon for this contention is not apposite. Appellees argue that an appeal from a decision under Rule 60(b), Fed. R. Civ. P., is subject to an abuse of discretion standard, citing Hines v. Seaboard Airline R.R. (Ed. Br., p. 4). But neither motion below mentions Rule 60(b) (I-581-582a, 615-616a) and Hines involved this Court's affirmance of a denial of relief from a dismissal under Rule 60(b)(1) based upon "excusable neglect". Moreover, Vulcan v. Civil Service Comm'n, cited in P. Br., p. 44 for the proposition that the abuse of discretion standard governs "details of relief", is also not in point since, unlike the instant case, it involved only ". . . interim relief expected to be required for less than a year . . ." which the court itself framed after a trial on the merits (450 F.2d at 399).

**Such a standard should be inapplicable here since there was no evidentiary hearing or trial below. Cf. Munters Corp. v. Burgess Indus., Inc., 535 F.2d 210 (2d Cir. 1976)(per curiam); Dopp v. Franklin Nat'l Bank, 461 F.2d 873 (2d Cir. 1972).

because the district court misapplied or overlooked the governing law. See e.g. Nat'l Assoc. of Letter Carriers v. Sombrotto, 449 F.2d 915, 921 (2d Cir. 1971); Stilwell v. Travelers Ins., 327 F.2d 931 (5th Cir. 1964) (Rule 60(b) motion; error of law as abuse of discretion); Williams v. Nichols, 266 F.2d 389, 391-392 (4th Cir. 1959); Bowles v. Simon, 145 F.2d 334, 337 (7th Cir. 1944) (error of law as abuse of discretion).

V

THE EXAMINERS' MOTION TO IMPLEMENT

Plaintiffs' arguments (P. Br., pp. 68-71) that denial of the Examiners' motion to implement was not erroneous lack merit.* (See Bd. Ex. Br., pp. 81-83.)

First, plaintiffs argue that they would be prejudiced by the relief sought below because the Permanent Plan's delegation of the responsibility to develop job analyses to the Board of Education (I-514-519a) was one of that Plan's "most significant protections" for plaintiffs (P. Br., p. 68). This contention is just not true.** Although plaintiffs insisted during

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* Moreover, even assuming arguendo that plaintiffs' contentions are correct, they do not respond to the thrust of the Examiners' motion that the court should take action to effectuate the March 1975 Order and the Permanent Plan. Plaintiffs' contentions only take issue with the particular order which the Examiners sought.

**Similarly, plaintiffs' suggestion that ". . . job analyses . . . are by law the responsibility of the Board of Education" (P. Br., p. 69) is without basis. The Board of Education's simple listing of the "duties" of a particular position is not the same as the preparation of a job analysis identifying the various qualities, behaviors, and bodies of knowledge which are actually significant in a supervisor's performance of his job. In fact, at the outset of this case, plaintiffs complained that the Board of Examiners' reliance on the Board of

settlement discussions that the prototype analyses be prepared by independent consultants, they did not express any preference as to whether the Board of Examiners or the Board of Education would be ultimately responsible for the analyses. In fact, they originally agreed with the Examiners that the latter would be responsible for this task (I-705-706a, 784-785a) and it was only at the suggestion of the Board of Education that the parties agreed to assign this responsibility to it. (I-705-706a, 784-785a.) Thus, the relief requested by the Examiners sought to implement the terms of the Permanent Plan without changing any of its essential features. Further, inasmuch as the Permanent Plan set forth agreed upon procedures for the preparation of job analyses (I-514-519a), and required detailed reporting to plaintiffs and the district court (I-509-512a, 535-538a), it is a misrepresentation for plaintiffs to suggest that the Board of Examiners would have been free to do as it pleased if the motion to implement had been granted.*

Education's listing of job duties was unlawful since that listing did not constitute a proper job analysis. Moreover, two recent cases in which plaintiffs' counsel are also involved suggest that it is preferable for the agency which prepares an examination to prepare the job analyses from which the test is constructed. See Jones v. N.Y.C. Human Resources Admin., 391 F. Supp. 1064, 1080 (S.D.N.Y. 1975), aff'd, 528 F.2d 696, 698-699 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3250 (U.S. October 4, 1976); Kirkland v. N.Y.S. Dep't of Correctional Serv., 374 F. Supp. 1361, 1373-1374 (S.D.N.Y. 1974), aff'd, 520 F.2d 420 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3249 (U.S. October 4, 1976).

* Moreover, plaintiffs would not have been prejudiced because the Examiners' motion sought to have Development Dimensions, a respected and experienced testing organization (I-781-787a), prepare the prototype analyses and plaintiffs did not object to that organization previously. (I-462-464a.)

Second, plaintiffs baldly contend that the relief sought by the Examiners under Rule 70, Fed. R. Civ. P. ". . . would be warranted only by contemptuous defiance of the court's order" (P. Br., p. 70). Yet, this contention is refuted by Rule 70's express terms which catalog a whole host of remedies where a party has failed to perform a specific act directed by the court, including the relief sought by the Examiners below, as well as a contempt adjudication. Clearly, a contempt adjudication is not a necessary predicate to the kind of direction sought by the Examiners below.*

Finally, plaintiffs advance a series of other unsupported contentions regarding Rule 70's scope, each of which is refuted by that Rule's terms.**

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* Rule 70 only says that a party must have "fail[ed] to comply" or be "disobedient". Moreover, although the Examiners did not seek an adjudication of civil contempt below, such an adjudication does not require a finding of willfulness, see e.g. N.L.R.B. v. Local 282, 428 F.2d 994, 1001 (2d Cir. 1970), and there is ample evidence to support a finding that the Board of Education did not perform its obligation under the prior decree and that it acted neither with the good faith nor with the diligence required (I-618-619a, 629-630a, 634-640a, 645-646a). The record is barren of any explanation for the Board of Education's total failure to act with regard to the prototype analyses prior to March 1976 when it rejected AIR's work product; and it suggests that the job analysis issue was seized upon as a pretext to hide its real intentions (I-602-603a, 641a, 684-687a, 712-725a).

**Thus, plaintiffs argue that Rule 70 is only meant to aid a plaintiff to secure relief from a defendant (P. Br., p. 70), but the Rule speaks of "a judgment direct[ing] a party . . . to perform any . . . specific act," and in a number of places refers to an application "of the party entitled to performance" (emphasis added). They also contend that only an "impartial third person" can be authorized to perform an act (P. Br., p. 70), but Rule 70 states that "some other person appointed by the court" may do the act and that language certainly does not preclude having Development Dimensions do the act together with the Examiners, the party entitled to performance.

CONCLUSION

It is respectfully submitted that the Judgment entered below should be reversed and this case dismissed in its entirety; or, in the alternative, remanded with instructions to deny the motion to "modify", and grant the motion to implement.

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Respectfully submitted,

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